

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CALIFORNIA ISP ASSOCIATION, INC.,

Complainant,

vs.

PACIFIC BELL TELEPHONE COMPANY
(U-1001-C); SBC ADVANCED SOLUTIONS, INC.
(U-6346-C) and DOES 1-20,

Defendants.

Case 01-07-027
(Filed July 26, 2001)

**ASSIGNED COMMISSIONER'S AND
ADMINISTRATIVE LAW JUDGE'S RULING
SETTING SCOPE AND SCHEDULE**

This ruling serves as the scoping memo for the above-entitled matter and schedules an evidentiary hearing to commence on September 16, 2002, at 10:00 a.m., at the Commission Courtroom, State Office Building, 505 Van Ness Avenue, San Francisco, California.

Background

On July 26, 2001, the California Internet Service Provider Association (CISPA, or "Complainant") filed this complaint against Pacific Bell Telephone Company (Pacific) and SBC Advanced Solutions Inc. (ASI) alleging unlawful discrimination by Pacific and ASI in the provision of digital subscriber line (DSL) transport services in California. On October 22, 2001, Pacific and ASI (jointly "Defendants") filed answers to the complaint and a motion to dismiss the

complaint. Defendants' motion to dismiss was denied by an Assigned Commissioner and Administrative Law Judge (ALJ) ruling on March 28, 2002.

Scope of Issues

This adjudicatory proceeding shall consider the following issues:

1. Failure to Furnish Just and Reasonable DSL Transport.

Whether Defendants have failed to furnish and maintain such adequate, efficient, just and reasonable DSL Transport service, as set forth in Pub. Util. Code § 451.¹ This issue shall include whether Defendants:

- a. Disconnected for an unreasonable period of time the DSL Transport facilities of end-use customers who desire to change their ISPs, thereby retaining or "clenching" customers for the benefit of ISPs owned or controlled by SBC ("Affiliated ISPs");
- b. Required ISPs to migrate all of their end-use customers to a new DSL Transport architecture prior to the filing of ASI's FCC tariff for DSL Transport Service.
- c. Generally failed to provision DSL Transport in a just and reasonable manner, although the proceeding will not address the explicit service provisioning terms set forth in Section 6.2 of ASI's FCC Tariff for wholesale DSL Transport.
- d. Failed to resolve billing and service disputes with ISPs involving DSL Transport in a just and reasonable manner.²

¹ All references are to the Public Utilities Code unless otherwise noted.

² This item will not include the subject of "split billing" which was raised by CISP in a July 26, 2001 motion in this case. CISP later withdrew that motion. This item is also not intended to duplicate any of the issues in C.02-01-007/Investigation (I.) 02-01-024.

2. **Discrimination in Provision of DSL Transport.** Whether Defendants violated Section 453 and 532 by granting a preference or advantage to Affiliated ISPs in providing and supporting DSL Transport, or by subjecting independent ISPs, and end-use customers of independent ISPs, to prejudice or disadvantage. This issue shall include whether Defendants:
- a. Offered and provisioned DSL Transport to Affiliated ISPs on preferential terms, including the time taken to provision DSL Transport facilities and establish DSL Transport connections for affiliates end-use customers versus independent ISPs end-users;
 - b. Substituted an affiliated ISP for the customer's requested independent ISP when provisioning the end-user's order for DSL Transport;
 - c. Allowed the sales representatives of Affiliated ISPs to have access to the DSL Transport orders placed by independent ISPs;
 - d. Paid bonuses to DSL Transport sales representatives when an end-use customer calls to inquire about DSL Transport and thereafter subscribes to an Affiliated ISP;
 - e. Used customer information provided by independent ISPs placing DSL Transport orders to solicit end-use customers on behalf of Affiliated ISPs;
 - f. Stated that an end-use customer must subscribe with an Affiliated ISP if the end-use customer wants to obtain DSL Transport from SBC-ASI;
 - g. Stated that an end-use customer will obtain DSL Transport more quickly if the end-use customer subscribes to an Affiliated ISP;

- h. Disparaged independent ISPs to end-use customers that inquire about DSL Transport, so as to encourage end-use customers to subscribe to an Affiliated ISP to obtain DSL Transport;
 - i. Provided DSL Transport support services to Affiliated ISPs on a preferential basis;
 - j. Allowed Affiliated ISPs to place DSL Transport orders for DSLAMs that are not available to independent ISPs.
3. **Failing to Furnish Sufficient Information for Informed Consumer Choice.** Whether Defendants violated § 2896 and D.00-05-021 by failing to provide sufficient information upon which California consumers may make informed choices among telecommunications services and providers, by:
- a. Stating that an end-use customer must subscribe to an Affiliated ISP if the end-use customer wants to obtain DSL Transport from SBC-ASI; and
 - b. Stating that an end-use customer will obtain DSL Transport more quickly if the end-use customer subscribes to an Affiliated ISP.
4. **Withdrawal of Benefits Available to DSL Transport Customers of Pacific Bell.** Whether Defendants violated the provisions of D.00-05-021 by withdrawing benefits that were available to DSL Transport customers of Pacific, and which were required to be maintained for DSL customers transferred to SBC-ASI, by:
- a. Unreasonably interrupting DSL Transport service to an end-user seeking to change ISPs, even though this changeover had been accomplished by Pacific with minimal service disruption prior to the transfer of customers to SBC-ASI; and

- b. Withdrawing the benefits of an always on, point-to-point connection, for the period prior to the filing of ASI's federal tariff.
- 5. **Improper Use of Non-Public Customer Information.** Whether Defendants violated § 2891 and Consumer Protection Rule 14 by improperly using non-public consumer information. This issue shall include whether Defendants:
 - a. Allowed the sales representatives of Affiliated ISPs to have access to orders for DSL transport placed by independent ISPs; and
 - b. Used customer information provided by independent ISPs to solicit DSL Transport customers on behalf of Affiliated ISPs.

Presiding Officer

Administrative Law Judge (ALJ) Dorothy Duda is designated as the presiding officer pursuant to Rule 6.3.

Schedule

At a prehearing conference on April 25, 2002, the parties agreed to the following schedule for this matter:

Complainant's Testimony	June 14, 2002
Defendants' Reply Testimony	August 2, 2002
Complainant's Rebuttal Testimony (if needed)	August 16, 2002
Completion of Discovery	August 30, 2002
Prehearing Conference	September 12, 2002 (10:00 a.m.)
Evidentiary Hearing	September 16 through 20, 2002 (10:00 a.m. to 4:00 p.m.)
Concurrent Opening Briefs	October 18, 2002
Concurrent Reply Briefs	November 8, 2002

Projected Case Submission	November 8, 2002
Presiding Officer's Decision	January 7, 2003

The evidentiary hearing will commence at 10:00 a.m., on Monday, September 16, 2002, at the Commission Courtroom, State Office Building, 505 Van Ness Avenue, San Francisco, California, and continue to 4:00 p.m. with appropriate breaks. These times may be amended to accommodate scheduling requests or to maximize the hearing time available. The parties may make short opening remarks prior to the opening of the evidentiary hearing, focusing on the critical facts to be elicited from the upcoming testimony. Other hearing room ground rules are set forth in Appendix A. The parties will have the opportunity to address legal and policy issues in briefs.

Prehearing Conference in Advance of Hearing

On Thursday, September 12, 2002, a prehearing conference will be held to discuss witness schedules, cross-examination estimates and other procedural matters pertaining to the evidentiary hearing. Parties are directed to meet and confer prior to the prehearing conference discuss the following:

1. Proposed witness schedule;
2. Cross-examination time estimates;
3. Witness constraints, scheduling problems, travel concerns, if any; and
4. Exhibit Lists. Each party is to exchange its exhibit list with the other parties participating in the hearing. Each exhibit list shall contain the name of the offering party and/or sponsoring witness. Following the meet and confer on the exhibit lists, each party shall prepare an exhibit list to present to the ALJ at the

prehearing conference that includes the nature of any objection to admission of the exhibit by any party or the statement of “no objection.”

All Exhibits shall be pre-marked for identification. CISPA should pre-mark its exhibits with numbers 1-199. Pacific and ASI should pre-mark its exhibits beginning with 200. Further requirements with respect to exhibits are set forth in Appendix A.

The official service list as of this date is attached to this ruling. All submissions shall be served on those on the current service list as well as on the Assigned Commissioner and Assigned ALJ. Submission to the assigned ALJ and to the service list shall be provided on the established filing or due date by electronic mail and hard copy. ALJ Duda may be e-mailed at dot@cpuc.ca.gov.

Categorization and Ex Parte Communications

Pursuant to Rule 6(b), the Commission categorized this matter as Adjudicatory. No party appealed this determination so that determination is now final. Ex parte communications are prohibited in adjudicatory proceedings pursuant to Public Utilities Code Section 1701.2(b) and Rule 7(b).

Motion to Intervene

On November 6, 2001, Morgen Van Buren, a resident of San Francisco and subscriber to the DSL service of ASI through an independent ISP and CISPA member, filed a motion to intervene in this complaint. Van Buren states he has experience with one of the alleged abuses in the complaint and he wishes to represent the interests of end-users of DSL services.

Defendants oppose Van Buren’s intervention request stating it is procedurally defective because he has not stated the alleged basis for his intervention and he fails to articulate any direct or immediate interest that he will

either gain or lose by the judgment in this case. According to Defendants, Van Buren's DSL internet service may or may not be affected by the resolution of this case and Van Buren, as a consumer, has no direct interest in the issues at the center of this dispute. In addition, Defendants state that Van Buren's claims concern hypothetical future conduct by Defendants so the issues he raises are not ripe. Defendants urge rejection of Van Buren's motion because the Commission does not have jurisdiction over the subject matter and the claims are rendered moot by ASI's federal tariff.

Complainants do not object to Van Buren's intervention as long as it is limited to the issues found within the scope of the complaint.

We have already rejected Defendants' assertions that the Commission does not have jurisdiction over ASI's DSL Service and that the federal tariff moots the issues raised in the complaint. Likewise, we do not agree with Defendants that Van Buren's issues are not ripe. Defendants are confusing statements Van Buren offers in opposition to the motion to dismiss with his request for intervention. Van Buren's statements regarding Defendants' future plans for DSL are related to the motion to dismiss rather than the intervention request. The Commission may gain factual information regarding the abuses alleged in this complaint from a DSL end-user such as Mr. Van Buren. Therefore, pursuant to Rule 53 of the Rules of Practice and Procedure, we will allow Van Buren to intervene in this case as a DSL end-user, but his participation must be pertinent to the issues already presented by CISPA and he may not unduly broaden them.

IT IS RULED that:

1. This is an adjudicatory proceeding.
2. The issues to be addressed are those set forth in this ruling.

3. The schedule of this proceeding is as set forth herein. The evidentiary hearing will commence at 10:00 a.m., on September 16, 2002, at the Commission Courtroom, State Office Building, 505 Van Ness Avenue, San Francisco, California and continue on subsequent days as established by the Administrative Law Judge (ALJ).

4. A prehearing conference will take place on September 12, 2002 at 10:00 a.m.

5. In advance of the September 12 PHC, parties shall meet and confer to address witness availability and scheduling, estimates for cross-examination, and preparation of the Exhibit List.

6. Administrative Law Judge Dorothy Duda is designated as the presiding officer.

7. Morgen Van Buren's motion to intervene is granted.

Dated May 10, 2002, at San Francisco, California.

/s/ LORETTA LYNCH

Loretta Lynch
Assigned Commissioner

/s/ DOROTHY J. DUDA

Dorothy J. Duda
Administrative Law Judge

Appendix A
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Ground Rules for Exhibits and Hearings

All prepared written testimony should be served on all appearances and state service on the service list, as well as on the Assigned Commissioner's office and on the Assigned ALJ. Prepared written testimony shall **not** be filed with the Commission's Docket Office.

Each party sponsoring an exhibit should, in the hearing room, provide two copies to the ALJ and one to the court reporter, and have at least five copies available for distribution to parties present in the hearing room. The upper right hand corner of the exhibit cover sheet should be blank for the ALJ's exhibit stamp. If there is not sufficient room in the upper right hand corner for an exhibit stamp, please prepare a cover sheet for the exhibit.

As a general rule, if a party intends to introduce an exhibit in the course of cross-examination, the party should provide a copy of the exhibit to the witness and the witness' counsel before the witness takes the stand on the day the exhibit is to be introduced. Generally, a party is not required to give the witness an advance copy of the document if it is to be used for purposes of impeachment or to obtain the witness' spontaneous reaction.

Generally, corrections to an exhibit should be made in advance and not orally from the witness stand. Corrections should be made in a timely manner by providing new exhibit pages on which corrections appear. The original text to be deleted should be lined out with the substitute or added text shown above or inserted. Each correction page should be marked with the word "revised" and the revision date.

Exhibit corrections will receive the same number as the original exhibit plus a letter to identify the correction. For example, Exhibit 5-A is the first correction to Exhibit 5.

Individual chapters of large, bound volumes of testimony may be marked with separate exhibit numbers, as convenient.

APPENDIX A

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Partial documents or excerpts from documents must include a title page or first page from the source document; excerpts from lengthy documents should include a table of contents page covering the excerpted material.

Motions to strike prepared testimony must be made **at least two working days before the witness appears**, to allow the ALJ time for review of the arguments and relevant testimony.

Notices, compliance filings, or other documents may be marked as reference items. They need not be served on all parties. Items will be marked using letters, not numbers.

No food is allowed in the hearing room; drinks are allowed, but you must dispose of containers and napkins every morning and afternoon.

(END OF APPENDIX A)

APPENDIX B - SERVICE LIST – Page 1

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(END OF APPENDIX B)

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Assigned Commissioner's and Administrative Law Judge's Ruling Setting Scope and Schedule on all parties of record in this proceeding or their attorneys of record.

Dated May 10, 2002, at San Francisco, California.

/s/ FANNIE SID

Fannie Sid

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074 or TTY# 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.